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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 930

MANOUTCHEHR AADAL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

MANOUTCHEHR AADAL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Manoutchehr Aadal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 18, 1966, which unanimously affirmed the judgment of conviction entered in the United States District Court for the Southern District of New York on July 12, 1966.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet reported. The decision of said Court denying petitioner's petition for rehearing (Appendix B) is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 18, 1966. A timely petition for rehearing was thereupon filed with said Court on December 1, 1966, and was denied on December 7, 1966.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

Questions Presented

1. Petitioner was tried more than 7 years after his arrest and more than 4½ years after indictment. The Government offered no excuse for this undue delay. The question is, therefore, presented whether it is not the obligation of the Government to move an indictment for trial expeditiously so that petitioner's silence and failure to demand an immediate trial cannot be deemed a waiver of his Sixth Amendment rights?

2. Whether it is not an essential element of the offense of making a false, fictitious, or fraudulent statement proscribed by Title 18 U.S.C. § 1001 that such statement be proved to relate to a material fact?

3. Whether the introduction in evidence of an allegedly incriminating admission elicited from petitioner during post-arrest, in-custody interrogation by an F.B.I. agent, in the absence of counsel and without petitioner being first fully apprised of his constitutional rights, does not violate his constitutional rights and constitute "plain error" within the purview of Rule 52(b) Fed. R. Crim. Pro. requiring reversal of the judgment of conviction herein?

4. Whether petitioner's conviction does not constitute a denial of due process since the record is completely devoid of any evidence that he was "knowingly and willfully" responsible for the allegedly false statements which the freight forwarding firm made in the Shipper's Export Declarations filed by it on behalf of petitioner's employer.

Statement

In 1958, petitioner accepted employment with a textile exporter named Hassan Rafati whom he had previously known in Iran (A16a, A38a-39a).* Rafati did business under the trade names of World-Wide Export Company, Western National Fabrics Company, Amerimpex Trading Company, Harfa Commercial Company, and All-American Fabrics Company (A41a). Rafati had filed certificates of doing business under each of the foregoing names with the County Clerk, New York County (A41a-42a).

Petitioner's duties included the performance of ministerial services for Rafati as well as the purchase of goods for shipment abroad by Rafati and the occasional delivery of letters to the freight forwarders containing Rafati's instructions (A39a). Each of said letters was written on the letterhead of one of Rafati's abovenamed companies and contained the signature "H. Rafati" (A31a).

The Indictment

Although petitioner was the only one tried, the indictment also named as defendants Rafati, the five companies owned by him and two other Iranian individuals.

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* References in parentheses preceded by the letter "A" are to pages of Appellant's Appendix filed with the United States Court of Appeals for the Second Circuit.

The indictment contained 77 counts. The Government presented no proof with respect to Count #1 which charged the defendants with conspiracy and the Count was severed, on the prosecutor's motion, at the close of the Government's case (A49a).

Each of Counts # 2-77 charged petitioner and the other named defendants with having violated Title 18 U.S.C. § 1001 by making or causing to be made false statements in Shipper's Export Declarations submitted to the Collector of Customs in New York during the period March 26, 1958, through February 25, 1959 (A2a-7a). The allegedly false statements pertained to the description and stated value of the goods being shipped to Iran by Rafati's firms. At the close of the Government's case the Court dismissed 28 Counts on the ground that the Government had not "sufficiently made out a case to go to the jury" (A52a, A70a, A73a).

The Government's proof as to the goods shipped by Rafati

Whatever evidence was submitted by the Government indicated that in 1958 petitioner approached Paul Rothman of Phillip Rothman & Sons, Inc., textile converters, and, after identifying himself as an employee of Rafati, arranged for the purchase of rags or pound goods from Rothman (A10a, A16a). Petitioner and Rothman agreed upon a price of 10¢ per pound for the goods; petitioner (*i.e.* Rafati's firms) was to bear the cost of transporting the goods to the pier and was to supply Rothman with the wooden cases in which he wanted the goods shipped (A11a-12a).

Following his conversation with petitioner, Rothman sold rags to the abovenamed five firms, which he knew to be owned by Rafati, and billed all of his sales to Western National Fabrics Company (A14a-16a). In each instance, Rothman's bill was promptly paid by check (A14a).

Petitioner ordered the wooden cases, which were delivered to Rothman's warehouse, from the George Kidney Packing Box Company. The cases were billed at the agreed upon price of $1.50 each to one or more of Rafati's companies, and payment was made by checks drawn upon one of the companies, mostly All-American Fabrics (A20a-21a).

The preparation and filing of the Export Declarations

Petitioner engaged the services of Ocean-Wide Forwarders to handle the necessary paper work in connection with the shipment of goods by Rafati's companies to Iran (A24a). The freight forwarder acts as the agent of and does all of the paper work for the exporters. This includes the preparation and filing of the Shipper's Export Declarations (A25a). The Export Declarations which form the basis of Counts #2-77 of the indictment were prepared, signed, and filed by Ocean-Wide Forwarders (A8a) pursuant to a notarized power of attorney signed by Rafati, as owner of the above-mentioned five companies, designating Ocean-Wide as his forwarding agent (A34a-35a). This power of attorney was filed by Ocean-Wide at the Custom House (A46a).

Francis Medina and Emigdio Ledesma, the two partners in Ocean-Wide Forwarders, testified that they prepared the Shipper's Export Declarations solely on the basis of the written instructions delivered to them by petitioner (A29a-

32a, A43a, A46a). In each case Ocean-Wide received a letter of instruction over Rafati's signature and a commercial invoice on the letterhead of one of Rafati's firms.

This documentary proof conclusively established that the Export Declarations included information which was not contained in those writings. Obviously, therefore, the freight forwarders must either have been supplied orally with additional information by petitioner or some other person, or they acted on their own responsibility and the erroneous statements in the Declarations cannot be attributed to petitioner.

Medina, however, was definite in his testimony that all of the information contained in the Export Declarations was delivered to him by petitioner in the form of the aforesaid writings (A27a-32a). Ledesma's testimony is to the same effect (A43a-46a). The record is absolutely devoid of any evidence indicating that petitioner supplied Ocean-Wide with any additional information other than what was contained in the letters of instruction and commercial invoices. Accordingly, there was no justification for the statement by the Court below that the jury "could readily conclude that the additional information in the Declarations was supplied by Aadal separately from the documents" (p. A4, *infra*). And, this defect in the Government's case is not cured by the prosecutor's leading question during his direct examination of Medina, "Did you make any of it up yourself?", or the witness's reply, "No, sir" (A27a).

Immaterial Nature of the Allegedly False Statements

Count #20 of the indictment is illustrative of the discrepancies between the Shipper's Export Declaration filed by Ocean-Wide and the accompanying commercial invoice or letter of instruction from Rafati covering that particular statement. Thus, the Export Declaration described the goods as follows (Govt. Exh. 108):

"15 Cases Cotton Upholstery Piece Goods	Value at U. S. Port
3400 Lbs	of Export
10200 Syds	$470.00"

The related commercial invoice of the shipper, Harfa Commercial Company, described the goods being shipped as follows (Govt. Exh. 108):

"Description		*Amount*
Dyed Cotton Upholstery Piece Goods unassorted under and over yard pieces, including rags and small pieces.		$470.00
Gross Weight:	3,700 lbs.	C & F
Net Weight:	3,400 lbs.	Khorramshahr"

As appears from the foregoing, the Export Declaration omitted the key words, "unassorted under and over yard pieces, including rags and small pieces" and included the figure "10200 SYDS" which was not contained in either the commercial invoices or letter of instruction—the only sources of information used by Medina and Ledesma in their preparation of the Export Declaration.

The Government urged and the Court below has found that "in each of the Declarations some item was falsified; if

value was accurately stated, the nature of the goods was misrepresented" (see page A5, *infra*).

We submit this is not the case, however, and again refer to Count #20 for purposes of illustration. The Declaration lists the value of 3400 lbs. of goods as $470.00. No one familiar with market prices of new textiles in New York City could possibly be misled into believing that 10,200 square yards of cotton upholstery piece goods were worth only $470.00. Thus, the valuation alone would serve notice that the goods were rags or pound goods and not new textiles. Moreover, the valuation is in fact not false as the following computation bears out:

3400 lbs. @ $0.10	$340.00
15 crates @ $1.50	22.50
15 crates trucking charge @ $1.50	22.50
Freight to Iran	82.50
Ocean-Wide fee	8.00
	$475.50

Also to be considered is the fact that petitioner had no possible motive for causing the rags and pound goods which he purchased for Rafati from Rothman to be misrepresented as new piece goods, because the commercial invoices valued the goods at 10¢ per pound, as rags, and also contained the significant statement, "including rags and small pieces."

Reasons for Granting the Writ

1. As noted above, petitioner was not tried until more than 4½ years after indictment and more than 7 years after his arrest. As a matter of constitutional law, this

unexcused delay on the part of the Government constituted a denial of petitioner's Sixth Amendment right to a speedy trial (*United States* v. *Lustman,* 258 F. 2d 475, 478, cert. den. 358 U.S. 880). The Court below, however, applied what it considered to be the rule in the federal courts and held that petitioner had waived his right to a speedy trial by not asserting it promptly.

This case, therefore, presents this Court with an opportunity to pass upon the question of whether it is not the Government's obligation to move an indictment for trial expeditiously so that an accused's silence and failure to demand an immediate trial cannot be deemed a waiver of his Sixth Amendment rights. While this Court has on several occasions denied certiorari in this type of case, it has never squarely ruled on this important question of constitutional law.

A minority of jurisdictions, including New York, have adopted a rule contrary to that prevailing in the federal courts (see, *e.g., People* v. *Prosser,* 309 N.Y. 352, 130 N.E. 2d 891; *People* v. *Wilson,* 8 N.Y. 2d 391, 208 N.Y.S. 2d 963). In *United States* v. *Lustman, supra,* the Court noted that "Judge Fuld's well-reasoned opinion in *People* v. *Prosser, supra,* explicates the reasons for placing the duty of procuring a prompt trial upon the state rather than upon the defendant," and it stated that it considered these reasons "weighty" and would have been persuaded to adopt a similar rule were it not for the fact that the contrary federal rule was already well established. In *United States* v. *Kelly,* 349 F. 2d 720, 768, cert. den. 384 U.S. 947, the majority opinion for the Court below again indicated the belief that "the rule of *Lustman* is too inflexible and should be modified."

As Judge Fuld so persuasively noted, the adoption of the New York rule merely imposes "upon the officers charged with enforcing the law and who secured the indictment, the quite reasonable, far from burdensome, duty of noticing it for trial." He rejected the suggestion that such a rule might enable a defendant to escape prosecution as "somewhat less than real," for the prosecutor "may at any time have the case placed on the calendar for a particular day" (*People* v. *Prosser, supra,* at p. 361).

It is completely unrealistic and fundamentally unfair to expect an accused to demand an immediate trial when the Government's failure to proceed must indicate to him that the prosecution may one day be abandoned. The intervening delay can never prejudice the Government, for if it actually is in possession of sufficient evidence to establish its case, it can move the indictment for trial whenever it chooses to do so. On the other hand, undue delay, attributable solely to the Government's reluctance to proceed, can gravely prejudice the defendant; for example, key witnesses required to establish the accused's defense may leave the jurisdiction and thus become unavailable, as in fact was the case with Rafati in the case at bar.

It is respectfully submitted that the present federal rule is inconsistent with the absolute right to a speedy trial guaranteed by the Sixth Amendment and that as a matter of constitutional law as well as fundamental fairness, this Court should now reject it in favor of the New York rule. Moreover, the constitutional guarantee should be uniform in its application throughout the land and the right to a speedy trial should not have a different meaning for a defendant tried in the United States District Court for the

Southern District of New York than for one tried directly across the street in the Supreme Court of the State of New York.

2. The test of whether an allegedly false statement is material is whether it "has a natural tendency to influence, or was capable of influencing the tribunal in making a determination required to be made" (*Blake* v. *United States,* 323 F. 2d 245, 246). Clearly, the allegedly false statements attributed to petitioner in the case at bar were not material since neither the Commerce Department nor the Bureau of Customs was required to or did in fact take any action in reliance upon the statements contained in the Export Declarations. The information contained therein is not used for the computation of fees or export duties but rather winds up in the government archives in a statistical compilation which is not acted upon further.

The Court below, however, held that "it is settled in this circuit that the false statements proscribed by Section 1001 need not be proved to be material", (see p. A5 *infra*). This is completely contrary to the rule applicable in most of the other circuits (*United States* v. *Marchisio,* 344 F. 2d 653, 656). In the last cited case the Court below noted that it had "expressly rejected the position taken by several other circuits that in every case proof of materiality is a requisite to a § 1001 conviction."

The majority of the circuits which have expressed themselves on this point have held that "an essential element of the offense of making a false, fictitious, or fraudulent statement proscribed by 18 U.S.C. § 1001 is that such statement relates to a 'material fact' " (*Brethauer* v. *United States,* 333 F. 2d 302, 306 (8th Cir.), and that "in order to gain a

conviction under U.S.C. § 1001 the Government must prove that the false statement was material" (*Paritem Singh Poonian* v. *United States,* 294 F. 2d 74, 75 (9th Cir.)). See also, *United States* v. *Zambito,* 315 F. 2d 266, 268-269 (4th Cir.) cert. den. 373 U.S. 924; *Rolland* v. *United States,* 200 F. 2d 678 (5th Cir.) cert. den. 345 U.S. 964; *Gonzales* v. *United States,* 286 F. 2d 188, 122 (10th Cir.); *Weinstock* v. *United States,* 231 F. 2d 699, 701-702 (D.C. Cir.).

We respectfully submit that the interpretation of a federal criminal statute should be uniform throughout the land and a review of the instant case will provide this Court with the opportunity to resolve the existing conflict between the circuits.

3. Following his arrest on April 9, 1959, petitioner was interrogated by Special Agent James T. Mulroy of the F.B.I. (A38a-40a). At the time of interrogation petitioner was without counsel and, insofar as the record discloses, had not been fully apprised of his right to remain silent. During the course of this interrogation petitioner told the agent that Rafati had shown him letters of credit covering the shipment of piece goods to Iran and that pursuant to Rafati's instructions, he had purchased rags or pound goods for these letters of credit (A40a). When asked by the agent why he had purchased rags when the letters called for piece goods, petitioner "shrugged his shoulders and didn't answer" (A40a).

The Government and the Court below seized upon the alleged admission by petitioner that he purchased rags in connection with Rafati's letters of credit to support the conviction below. We submit, however, that this alleged admission was of no probative value with respect to

Counts #2-77 of the indictment charging petitioner with knowingly and willfully making false statements in the Export Declarations. It was only relevant, if at all, in connection with Count #1 charging a conspiracy to defraud Iranian banks and the International Co-operation Administration by shipping rags in place of piece goods. As noted above, however, this Count was severed and petitioner's present conviction cannot be justified by reference to his alleged participation in an unlawful scheme or plan not charged in the several counts of the indictment upon which he was convicted.

Moreover, despite the Government's repeated suggestion that the alleged admission "has to cover all of these counts like an umbrella" (A50a) and that it "shows knowledge . . . that he knew what he was doing" (A78a), it does not show that petitioner gave Ocean-Wide any information other than that which was contained in the commercial invoices and Rafati's letters of instruction. The mere fact that the petitioner knew that he was purchasing rags and not piece goods does not explain the inclusion in the Export Declarations of matter which, on the record, is clearly not attributable to petitioner, or the omission of the word "rags" which was contained in the commercial invoices. Furthermore, the trial court should have excluded the alleged admission since it was elicited from petitioner under circumstances demonstrating a violation of his constitutional rights.

Relying on this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719, the Court below held that the rules established in *Miranda* v. *Arizona*, 384 U.S. 436, "are not to be retroactively applied to cases such as this where the trial began before the decision in *Miranda* was handed down"

and that petitioner waived his rights because his trial counsel did not object to the introduction in evidence of the statements to the F.B.I. agents (see p. A6 *infra*).

There are two obvious fallacies in the Court's reasoning, however. In the first place, since petitioner was tried in May 1966, he was entitled to the full benefit of this Court's decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (*Johnson* v. *New Jersey, supra*, at p. 721). Accordingly, the alleged admission should have been excluded on constitutional grounds since it was obtained during a period of post-arrest, in-custody interrogation in the absence of counsel and without petitioner being fully apprised of his right to remain silent.

This Court has the power to notice "plain error" even though not assigned or specified below (*Silber* v. *United States*, 370 U.S. 717).* Since the Court below refused to pass upon the merits of petitioner's contention—although it had the power to do so under Rule 52(b) of the Federal Rules of Criminal Proceedure**—it is respectfully requested that this Court examine his claim and act upon the "plain error" presented by the record.

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* In *White* v. *Maryland*, 373 U.S. 59, defendant did not object at his trial to the introduction of evidence with respect to his plea of guilty at a preliminary hearing when he was not represented by counsel. This Court did not hesitate to reverse. Similarly in *Westover* v. *United States*, 342 F. 2d 684, rev'd. *sub. nom. Miranda* v. *Arizona*, 384 U.S. 436, defendant did not make appropriate objections during his trial and this Court held that it was not thereby precluded from considering the issue.

** Rule 52(b) Fed. R. Crim. Pro. provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

4. While we recognize that this Court will not ordinarily grant certiorari to review evidence and discuss specific questions of fact, we submit that in the case at bar petitioner was deprived of due process since there was no evidence to support his conviction of the crimes charged. As this Court stated in *Thompson* v. *City of Louisville,* 362 U.S. 199, "it is a violation of due process to convict and punish a man without evidence of his guilt."

We have discussed above our contention that the record is completely devoid of any evidence that petitioner was "knowingly and willfully" responsible for the allegedly false statements which the freight forwarding firm made in the Shipper's Export Declarations filed by it on behalf of petitioner's employer. We have also analyzed the nature of the allegedly false statements and demonstrated that in fact the value of the goods shipped was accurately stated.

With respect to the description of the goods, the commercial invoices accompanying each shipment included the significent term "rags" and, from the stated value, it would have been immediately apparent to anyone knowledgeable in the textile field that the goods were not new piece goods. At worst, the statments contained in the Export Declarations may have been unclear or confusing and might have prompted a request for clarification. This, however, does not mean that they were false. As the Court stated in *United States* v. *Maxwell,* 277 F. 2d 581, 590, "if the answer could be said to be unclear or confusing, its effect could, at most, be no more than to induce a request for clarification. Certainly it could not be considered as a false and fraudulent representation."

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 190—September Term, 1966.

(Argued October 20, 1966 Decided November 18, 1966.)

Docket No 30733

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANOUTCHEHR AADAL,

Defendant-Appellant.

Before:

WATERMAN, HAYS and ANDERSON,

Circuit Judges.

Appeal from a judgment of conviction for making false statements to a government agency in violation of 18 U. S. C. §1001 entered on a jury verdict in the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, *Judge.*

Affirmed.

JOHN H. DOYLE, III (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Pierre N. Leval, Assistant United States Attorney, on the brief), *for Appellee.*

MORRIS WEISSBERG (Gerald Zisholtz, New York, N. Y., on the brief), *for Appellant.*

HAYS, *Circut Judge*:

Defendant Aadel was convicted by jury verdict of violating 18 U. S. C. §1001[1] by knowingly making and causing to be made false statements in each of forty-eight Shippers Export Declarations. His principal contention on this appeal is that there was insufficient evidence to support the judgment of conviction. We affirm the judgment.

The appellant who has spent much of his adult life in the export-import business, associated himself with a textile importer named Hassan Rafati early in 1958. Rafati had letters of credit drawn on several New York banks which called for the shipment to Iran of yard goods or piece goods. The latter terms are used interchangeably in the textile trade to describe goods which are measured and sold by the yard as more or less full bolts of cloth rolled on tubes.

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[1] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Rafati and Aadal arranged for the shipment of rags in connection with these letters of credit, under shipping documents which described the goods as substantial yardages of fine quality piece goods. In particular, it was shown that Aadal purchased rags and scraps from one Rothman, had them packed in wooden crates marked for shipment to Iran, and had them sent to various piers for shipment. Representing himself as an exporter of piece goods, he engaged the services of a freight forwarding agent, Ocean-Wide Forwarders, to handle all documents involved in shipping the goods. He instructed Ocean-Wide as to the descriptions, weights, measurements and values to be entered on the shipping documents.

Pursuant to Aadal's instructions. Ocean-Wide prepared United States Commerce Department Shippers Export Declarations which were filed with the Export Control Section of the United States Bureau of Customs. The government contended, and the jury found, that the statements in the Export Declarations were false and were made under Aadal's direction.

I.

Defendant's primary contentions on this appeal concern the sufficiency of the evidence supporting his conviction on each of the forty-eight counts. We have only a limited power to review the evidence on which the jury based its verdict.

> "The test is whether, taking the evidence in the view most favorable to the government, there is substantial evidence to support the verdict. . . . This circuit has never held that circumstantial evidence, to

> be sufficient to convict, must exclude every reasonable hypothesis of innocence to be drawn from the evidence." *United States* v. *Tutino*, 269 F. 2d 488, 490 (2d Cir. 1959) (citations omitted); see *United States* v. *Robbins*, 340 F. 2d 684, 687 (2d Cir. 1965); *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), cert. denied, 375 U. S. 836 (1963).

In the instant case the evidence clearly meets this test. Aadal argues that the only information which he supplied for inclusion in the Export Declarations, contained in commercial invoices and letters of instruction, was accurate. Discrepancies between the Declarations and these documents are, he suggests, attributable to errors by Ocean-Wide's employees. However, even if we should accept appellant's contention that the letters and invoices were accurate, his premise that he provided no information other than what was contained in these documents is contrary to the evidence. Medina, the partner in Ocean-Wide who dealt with defendant, testified that Aadal furnished all the data incorporated in the Declarations, and that he, Medina, did not contrive any of them. The jury, therefore, could readily conclude that the additional information in the Declarations was supplied by Aadal separately from the documents to which he refers us. Appellant's central role in the whole scheme and Medina's testimony that he dealt exclusively with Aadal in these transactions further support the inference that Aadal supplied the false data. For similar reasons the absence of commercial invoices pertaining to three of the Declarations does not vitiate appellant's conviction on the counts based upon these Declarations.

Appellant next contends that since statements of value in many of the Declarations were not false, no crime was committed. However, in each of the Declarations some item was falsified; if value was accurately stated, the nature of the goods was misrepresented. Appellant appears to contend that the latter falsification was not material as long as the stated value was correct. While the materiality of the statements seems clear, it is settled in this circuit that the false statements proscribed by Section 1001 need not be proved to be material. *United States* v. *Marchisio,* 344 F. 2d 653, 666 (2d Cir. 1965); *United States* v. *McCue,* 301 F. 2d 452, 456 (2d Cir.), cert. denied, 370 U. S. 939 (1962); *United States* v. *Silver,* 235 F. 2d 375 (2d Cir.), cert. denied, 352 U. S. 880 (1956).

Aadal's knowing participation in the scheme was also shown by the testimony of an agent of the Federal Bureau of Investigation who stated that Aadal had admitted purchasing rags in connection with letters of credit which Aadal knew called for piece goods. The conclusion of Aadal's guilt is further supported by the fact that Aadal sought rags at the cheapest possible price but shipped them in wooden crates in the way piece goods would be shipped although this was an uneconomical method for shipping rags because ocean freight is calculated on a bulk basis.

Viewed as it must be "in a light most favorable to the government," *United States* v. *Robbins, supra,* 340 F. 2d at 687, the evidence supporting the conviction is, therefore, clearly sufficient.

II.

None of appellant's other claims of error has merit. He contends that the statements he made to the FBI agent should not have been admitted because they were obtained under circumstances that did not meet constitutional standards expressed in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). However, the rules established in *Miranda* are not to be retroactively applied to cases such as this where the trial began before the decision in *Miranda* was handed down. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Appellant apparently does not claim that his admission was obtained in violation of constitutional standards established before *Miranda*. See *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). In any event, appellant has waived any such claim by not objecting to the introduction into evidence of his statements to the FBI agent. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966); *United States* v. *Repetti*, 364 F. 2d 54, 56 (2d Cir. 1966).

The other claimed errors, denial of a speedy trial and allegedly prejudicial remarks of the prosecutor in his summation, were similarly waived when timely objections were not interposed. It is established that "the right to a speedy trial after arrest or indictment is deemed waived unless promptly asserted." *United States* v. *Sanchez*, 361 F. 2d 824, 825 (1966); *United States* v. *Smalls*, 363 F. 2d 417, 419 (2d Cir. 1966); *United States* v. *Lustman*, 258 F. 2d 475, 478 (2d Cir.), cert. denied, 358 U. S. 880 (1958). Similarly, even if we accept appellant's dubious claim that the prosecutor in his summation misrepresented defense counsel's

position, "it was not, at least absent objection, reversible error." *United States* v. *Johnson*, 331 F. 2d 281, 282 (2d Cir.), cert. denied, 379 U. S. 905 (1964); see *Lawn* v. *United States*, 355 U. S. 339, 359 n. 15 (1958).

The judgment of conviction is affirmed.

APPENDIX B

Decision of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MANOUTCHEHR AADAL,

Defendant-Appellant.

PETITION FOR REHEARING

Before: WATERMAN, HAYS and ANDERSON, Circuit Judges.

Petition for rehearing denied.

S. R. W.
P. R. H.
R. P. A.
C. JJ.

December 7, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 930

MANOUTCHEHR AADAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; II R. 37b-42b) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1966. A petition for rehearing was denied on December 7, 1966. The petition for a writ of certiorari was filed on January 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the delay in bringing petitioner to trial required reversal of his conviction, when he raised no objection to the delay at any time before or during trial.

2. Whether the evidence was sufficient to support the conviction.

3. Whether the trial court committed plain error in permitting an F. B. I. agent to testify concerning a voluntary post-arrest admission by petitioner made after he was warned of the consequences of his speaking and of his right to consult an attorney.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted by a jury, in the United States District Court for the Southern District of New York, under forty-eight counts of an indictment charging that he and others, in violation of 18 U.S.C.

1001, knowingly made false statements in shippers' export declarations submitted to the Collector of Customs in 1958 and 1959 by describing rags worth ten cents a pound as good quality fabrics of a greater stated value (I R. 2a-7a4).[1] On July 12, 1966, petitioner was sentenced to imprisonment for four years on each count, the sentences to run concurrently (I R. 1a). The court of appeals affirmed the conviction (II R. 37b-43b).

1. In 1958, petitioner, who had spent most of his adult life in the import-export business, met in New York a man whom he had previously known in Iran, Hassan Rafati, a textile importer and exporter who did business under various names (II R. 24b, 26b-27b). Rafati showed petitioner letters of credit, drawn on New York banks, which called for the shipment to Iran of various amounts of textile piece goods for stipulated sums of money (II R. 24b, 26b). Petitioner agreed to work with Rafati in making purchases and shipments under the letters of credit. Later, they arranged for the purchase, crating and shipping of rags instead of the piece goods called for in the letters of credit (II R. 24b-26b).[2]

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[1] The indictment contained seventy-seven counts. Count 1, charging conspiracy to defraud the International Cooperation Administration of the Department of State by the use of false documents, was severed. Twenty-eight other counts, each charging the submission of a false shipper's export declaration, were dismissed by the court during trial (I R. 1a).

[2] "Piece goods" or "yard goods," in the terminology of the textile trade, are "more or less full bolts [of fabric] * * * rolled on tubes." "Rags" are scrap "from an inch up to three-quarters of a yard, in any condition, damaged condition, with holes or what have you." (II R. 7b.)

In January 1958, petitioner told Paul Rothman of a New York City textile company that he was interested in purchasing rags of the cheapest kind available, which he wanted packed in wooden crates (II R. 1b-3b). When Rothman asked petitioner why he wanted rags packed in wooden crates—a method of packing in which the freight charges could exceed the value of the rags—petitioner smiled but did not answer (II R. 11b-12b). They finally agreed that Rothman would supply petitioner with rags from his warehouse at twenty cents a pound, a price later cut to ten cents a pound (II R. 3b, 10b); that Rothman would pack the rags in wooden crates supplied by petitioner and mark the crates "Khorramshahr," the Iranian port of destination (II R. 3b-4b, 20b); that Rothman would have his trucker deliver the crates to various piers to be specified by petitioner (II R. 4b-5b); and that Rothman would submit the bills for the rags and the trucking expenses to Western National Fabrics, one of Rafati's companies (I R. 14a; II R. 4b-6b, 27b). Subsequently, petitioner, stating he was in the "piece goods business," arranged to have a freight forwarding company handle his shipments (II R. 17b-20b).[3]

Shipments were made in accordance with the above arrangements on numerous occassions in 1958 and 1959 (II R. 3b-5b). Petitioner had the packing crates

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[3] A freight forwarder functions as the agent of an exporter in making out dock receipts, export declarations, and bills of lading, in clearing the export declarations at the customhouse, and in processing the bills of lading with the steamship companies (II R. 19b-20b).

delivered to Rothman and helped pack them with rags (II R. 4b). For each shipment, petitioner supplied the freight forwarder with a letter of instructions which described the material as piece goods (Gov. Exs. 103-161; I R. 28a-34a, 46a; II R. 21b-22b, 29b). Petitioner supplied the forwarder with the value and description to be put in the export declaration (II R. 22b).

2. On April 9, 1959, petitioner was arrested by an agent of the F. B. I., was advised "that he had the right to consult an attorney" and "that anything he [told the agent] could be used against him in a court of law," and was then interviewed concerning the shipments to Iran (I R. 40a; II R. 23b-24b). Petitioner stated that he had gone to work for Rafati after Rafati had shown him the letters of credit calling for the shipment of piece goods to Iran, that in connection with the shipments he had purchased rags for Rafati instead of piece goods, and that he had typed up various instructions concerning the shipments and delivered them to the freight forwarder (II R. 24b-26b). When the agent asked why rags were purchased when the letters of credit called for piece goods, petitioner did not answer (II R. 25b-26b).

At trial, petitioner raised no objection to the agent's testimony concerning the interview.

ARGUMENT

1. Petitioner contends that he was denied his right to a speedy trial in that he was arrested in April

1959, indicted in November 1961, but not tried until May 1966. However, unless the right is asserted by way of a demand for trial, a defendant ordinarily has no grounds for later challenging the legality of the government's delay in bringing him to trial. *Harlow* v. *United States*, 301 F. 2d 361, 367 (C.A. 5), certiorari denied, 371 U.S. 814; *United States* v. *Van Allen*, 288 F. 2d 825 (C.A. 2), certiorari denied, 368 U.S. 836; *United States* v. *Lustman*, 258 F. 2d 475, 478 (C.A. 2), certiorari denied, 358 U.S. 880. A defendant who is content to let charges stand untried for a protracted period on the chance that he might never be brought to trial cannot thereafter complain of the delay. See *United States* v. *Haller*, 333 F. 2d 827, 828 (C.A. 2), certiorari denied, 379 U.S. 921. In the present case, not only did petitioner make no demand for expedition at any time prior to trial, he raised no objection to the delay at any time during the trial. The matter was first raised in the court of appeals. This was plainly too late. Cf. *United States* v. *Sanchez*, 361 F. 2d 824, 825 (C.A. 2); *D'Ercole* v. *United States*, 361 F. 2d 211, 212 (C.A. 2).[4] Nor has petitioner shown any prejudice from the delay. The case was based primarily on documentary evidence.

2. The evidence was clearly sufficient to support the conviction. Petitioner knew that the crates con-

[4] In both of the state cases on which petitioner relies (Pet. 9-10), *People* v. *Wilson*, 8 N.Y. 2d 391, 171 N.E. 2d 310 (1960), and *People* v. *Prosser*, 309 N.Y. 353, 130 N.E. 2d 891 (1955), the matter was raised by the defendant in a pretrial motion to dismiss.

tained rags, for he had ordered the rags from Rothman (II R. 2b-4b) and aided in packing the rags in the crates (II R. 4b). Yet, though he knew the shipments were of rags, he typed and hand-delivered letters of instruction under which the freight forwarder was to list the contents of the crates in the export declarations as specific kinds of piece goods (Gov. Exs. 103-161; I R. 28a-34a, 46a; II R. 21b-22b, 29b), and the forwarder listed the contents of the crates and their value [5] in the export declarations as they were given to him by petitioner (Gov. Exs. 15-74, 103-161; I R. 8a, 32a; II R. 22b, 28b-29b). The jury, which was instructed on the elements of aiding and abetting (I R. 85a-86a), could properly find that petitioner caused the making of false statements as charged in the indictment.

Petitioner argues that the evidence did not demonstrate the materiality of the false statements (Pet. 11-12). It would be difficult to conceive of more material representations in an export declaration than the nature and value of the cargo. While the court below

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[5] Petitioner argues that the valuations were not necessarily false, and demonstrates in one particular example that, by multiplying the net poundage listed in the declaration by the ten cents a pound charged by Rothman and adding the costs of crating and shipping, a figure is reached which closely approximates the listed value (Pet. 7-8). The fallacy of the argument lies in the fact that the net poundage figures were also overstated. In the example on which petitioner relies, fifteen cases were described as containing goods weighing 3,400 pounds. Since the weight of the rags in each case was actually only 100 pounds (Def. Ex. A; II R. 12b), the weight of the shipment was overstated by approximately 1,900 pounds.

noted that the false statements proscribed by 18 U.S.C. 1001 need not be proved to be material, it also observed that in this case "the materiality of the statements seems clear" (Pet. App. A5).

3. Petitioner contends that the trial court committed plain [6] error in allowing the F. B. I. agent to testify concerning petitioner's admission, because, although the agent testified that he had first informed petitioner of his right to consult counsel and of the consequences of speaking (II R. 24b), the agent did not testify specifically that he had also told petitioner that he did not have to say anything.[7] There is no merit to his contention. Petitioner does not suggest that his admission was in any respect involuntary. He was fully apprised of his right to consult with counsel and does not claim that he requested and was denied counsel. The rationale of *Escobedo* v. *Illinois*, 378 U.S. 478, is thus inapplicable. And since the trial took place before this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, the principles of that decision are also inapplicable. *Johnson* v. *New Jersey*, 384 U.S. 719.

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[6] Petitioner had not objected to the testimony when it was made, but contends that its admission was "plain error" which the court, under Rule 52(b) of the Federal Rules of Criminal Procedure, should have corrected despite the absence of timely objection.

[7] We do not accept the factual basis of this contention. The agent's report of the interview, which was furnished to defense counsel in accordance with 18 U.S.C. 3500, recites that "Aadal was initially advised that he did not have to make any statement." A copy of this report (Gov. Ex. 3504 for identification) has been lodged with the Clerk of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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